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Cases Cited by Petitioners

Arthur *vs.* Cumming, 91 U. S. 362.

Deckert *vs.* Filbert, 3 Watts & Sergeant (Penna.) 454.

Evans, In re, 161 Fed. 590.

Fackleman, In re, 248 Fed. 565.

Hall *vs.* Lanning, 91 U. S. 160.

Hobbs *vs.* McLean, 117 U. S. 567.

New Haven *vs.* Whitney, 36 Conn. 374.

Scott *vs.* Ford, 52 Or., 288.

State *vs.* Tucson Gas Co. 15 Arizona 294.

Temple, In re, 23 Fed. cases, 835.

Township *vs.* Dubuque, 7 Iowa, 262.

Williams *vs.* Benedict, 8 Howard (49 U. S.) 107.

Yonley *vs.* Lavender, 88 U. S. 276.

Cases Cited in Opinion of Circuit Court of Appeals

Armstrong *vs.* Fisher et al, 224 Fed. 227.

Forbes et al, In re, 128 Fed. 137-140.

Francis *vs.* McNeal, 228 U. S. 695.

Stem & Company, In re, 127 Fed. 547.

Vaccaro et al, *vs.* Secy. Bank of Memphis, 130 Fed. 436.

Yungbluth *vs.* Slipper et al, 185 Fed. 773.

IN THE

Supreme Court of the United States

———:———

No. 590 **October Term, 1923**

GEORGE R. MEEK,

Petitioner,

v

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, Individually, Bankrupts,

Respondents,

———

No. 591 **October Term, 1923**

FLORENCE F. DALE,

Petitioner,

v

SAME,

Respondents,

———

No. 592 **October Term, 1923**

ANDREW BREEZE,

Petitioner,

v

SAME,

Respondents,

———

Certiorari to Circuit Court of Appeals for the Third Circuit.

Statement of the Case.

John M. Shugert on June 30, 1922, filed a combination petition in bankruptcy, voluntary as to himself, but involuntary as to his alleged partners, in the Middle District of Pennsylvania (Record 8) in which he sets forth that he individually is insolvent and that he, "George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze who survived Lavinia Catherine Harris, now deceased, also a partner in her life time, are and have been partners under the style of Centre County Banking Company, with its principal place of business at Bellefonte, Pa." and that the partnership is likewise insolvent. He further avers that Lavinia Catherine Harris (who in her life time was a partner) died on the 10th day of January, 1921, and that her estate is now being administered in the Orphans' Court of Centre County, Pa. This original petition prayed for a subpœna which was awarded and served upon the surviving alleged other partners. The Respondents moved to quash and set aside the said subpœna upon the grounds, *inter alia*, that it was not responsive to the prayer of the petitioner in that it required the remaining living partners to show cause why each of them should not be individually adjudicated a bankrupt.

The District Court (Record 54) sustained the motion to quash the subpœna by an order entered September 15th, 1922, but on same day allowed petitioner to amend the prayer of his petition and directed a subpœna to issue as prayed for in the amended petition (Record 54).

The prayer in the original petition was:—

> "That such partnership and your petitioner as an individual and surviving partner of Lavinia Catherine Harris, deceased, may be adjudged bankrupts * * * * and that service of this petition with a subpœna be made upon George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze such non-consenting partners and that proceedings be had as are provided in said law and general order VIII of the Supreme Court and as the court may order."

The prayer in the amended petition (Record 58) is in the following language:—

> "That such partnership as well as George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and your petitioner, surviving partners of Lavinia Catherine Harris, deceased, may each individually, as well as said Firm, be adjudged bankrupts and that service of this petition, with a subpœna, be made upon George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze such non-consenting partners, etc."

It will thus be seen that the prayer in the original proceedings was that Shugert, the petitioner, and the Centre County Banking Company a partnership, be adjudged bankrupt. The amended prayer is that Shugert and the other surviving partners of Lavinia Catherine Harris, deceased, *as individuals* should be adjudged bankrupts, as well as the Centre County Banking Company which Shugert alleged was a partnership composed of himself and the other respondents, who in turn survived Lavinia Catherine Harris who in her life time was a partner.

The Respondents, having therefore denied that they were in fact partners, then moved to quash the subpœna and dismiss the amended petition for reasons set forth in the motion (Record 65 and 74) which reasons may be briefly summarized as follows:—

(1) The Bankruptcy Court has no jurisdiction to adjudicate these respondents bankrupts individually upon the voluntary petition of Shugert and that this petition in bankruptcy so far as it effects Meek, Dale and Breeze is an in-

voluntary petition filed against them which does not set forth proper jurisdictional averments required to be incorporated in an involuntary petition.

(2) That the amendment should not have been allowed because the effect thereof was to substitute an involuntary petition in bankruptcy against individuals, for the voluntary petition originally filed.

(3) That it appears upon the face of the petition that the partnership was dissolved by the death of one of the partners before the petition was filed, whose estate is now in process of administration in the State Probate Court.

(4) That there is no authority in the Bankruptcy Act of 1898 conferring power or authority upon one partner to file a petition in bankruptcy in the partnership name, where said petition shows that one or more of the remaining partners do not assent or consent thereto.

(5) That General Order No. 8, if it be contended that it is authority for one partner to institute bankruptcy proceedings in the partnership name and in such proceedings to have adjudicated as bankrupts, individually, non-consenting partners who refuse to join in the bankruptcy petition thus instituted by one partner and have their individual property administered in the bankruptcy Court, is, in effect, legislation not authorized by Congress.

The District Court denied the motion to quash the subpœna and the amended petition, without opinion filed, from which order a petition to revise was filed in the Circuit Court of Appeals and that court affirmed the order and denied the petition to revise. It is upon this record that this court allowed the certiorari in each of these cases.

Questions Involved.

(1) Jurisdiction of a bankruptcy court to issue a subpœna upon a voluntary petition of one partner requiring non-consenting partners to show cause why they should not be adjudged bankrupts individually.

(2) Jurisdiction of a Bankruptcy Court to adjudicate a partnership bankrupt upon the sole petition of one partner without the consent of remaining partners, before dissolution or after dissolution by operation of law.

(3) Jurisdiction of a Bankruptcy Court to hear and determine a petition in bankruptcy filed by one partner to have the partnership adjudicated bankrupt without consent or assent of remaining partners, where it appears upon the face of the petition that, prior to the filing of the petition, as a result of the death of one of the alleged partners, the partnership was dissolved by operation of law, and the estate of such deceased partner is being administered in the State Probate Court.

(4) Scope and interpretation of the provisions of General Order No. 8 as applied to the case at bar.

(5) Is not a single procedure in bankruptcy against several respondents as individuals a misjoinder.

Specifications of Error.

(1) The District Court and the Circuit Court of Appeals erred in denying the motion of respondents (Petitioners) to quash the subpoena issued upon the amended petition. (Record 65-68).

(2) The District Court and the Circuit Court of Appeals erred in denying the motion of respondents (Petitioners) to dismiss the amended petition for reasons set forth therein. (Record 65–68).

(3) The District Court erred in denying the motion of respondents (Petitioners) to set aside the subpoena and dismiss the amended petition; the motion being, "Wherefore, respondent files this his motion to dismiss the said petition in bankruptcy and set aside the subpœna issued against him therein, at the cost of the said John M. Shugert * * * * " (for reasons assigned see Record 65-68), and the order and decree of said Court thereon being, "October 20, 1922, after argument and on due consideration the motion to dismiss is denied.

CHARLES B. WITMER,
District Judge."

(4) The Circuit Court of Appeals erred in denying the respondents' petition to revise in matter of law the order of the District Court denying the motion of respondents to set aside the subpoena and dismiss the amended petition; the prayer of said petition being, "Wherefore your petitioner, feeling aggrieved because of such order, asks that the same may be revised in matter of law by your Honorable Court as provided in Section 24 b of the Bankruptcy Law of 1898, as amended * * *" (for reasons assigned see Record 83-89), and the decree of

said Court thereon being, "The order appealed from is affirmed".

(5) The District Court and the Circuit Court of Appeals erred in holding that one partner might, without the consent or against the protest of remaining partners, institute voluntary proceedings in bankruptcy in the partnership name, and bring about an adjudication of bankruptcy against the partnership.

(6) The District Court and the Circuit Court of Appeals erred in holding that one partner might institute proceedings in bankruptcy to have remaining partners adjudicated bankrupts individually.

(7) The District Court and the Circuit Court of Appeals erred in holding that where it appears upon the face of the record that a partnership has been dissolved by the prior death of one of the partners, whose estate is being administered in the State Probate Court, another partner may institute proceedings in bankruptcy to have the partnership, and remaining partners individually, adjudicated bankrupts.

(8) The District Court has no jurisdiction to receive the combination petition in bankruptcy of this petitioner, praying for an adjudication of bankruptcy against himself personally, and also praying for a similar adjudication of bankruptcy against a partnership of which he is a member, his petition averring the non-consent of his alleged partners.

(9) The District Court has no jurisdiction to receive the combination petition in bankruptcy of this petitioner, praying: 1st, that he, himself, be adjudged a bankrupt; 2nd, that a partnership of which he is a member, be adjudged a bankrupt; and 3rd, that his non-consenting partners each be adjudged a bankrupt, individually.

Brief of Argument.

Banking corporations are not within the jurisdiction of bankrupt courts. They are excepted by the express language of the Act of 1898. Why is this legislative exception so expressed when such a wide range of corporations are made subject to the provisions of the Act? It can't be because of the mere fact of their being corporations, but because of the nature of the banking business. We, therefore, assume that it is against the policy of the law to subject banks as a class to the dangers of being harassed and embarrassed by the threats of depositors to throw them into bankruptcy. The Centre County Banking Company was, as its name indicates, in every business sense a bank of deposit and of general discount, and in fact differed from any other bank only in being a partnership. Why then strain the whole frame work of our bankrupt act to force this particular bank into a bankrupt court? Much less, why resort to judicial legislation that violates the fundamental laws of partnership and the express provisions of the Act of Congress in order to authorize this anomalous situation both in the pleadings and in the merits? The record reveals a most unusually new and anomalous procedure. A single partner by one petition prays that he, individually, may be adjudicated a bankrupt, and that the partnership be likewise so adjudicated. In his said petition he makes certain averments that establish the fact, that the partnership was in law dissolved by the prior death of one of the partners, whose estate was then being administered in the Orphans' (Probate) Court of Centre County, and that his petition was without the assent of his remaining partners, and fails to aver that he is a creditor. By an amended petition allowed in the court below he adds to this already complicated procedure a prayer for an adjudication of bankruptcy against each of his alleged partners as indi-

viduals, without averring any jurisdictional grounds therefor. To support this dragnet process, this Court is asked to legislate into the Act of Congress methods of procedure not expressed in the congressional legislation.

The reasons for avoiding such innovation are developed in the following discussion:

I

A COURT OF BANKRUPTCY HAS NO JURISDICTION TO ISSUE A SUBPOENA UPON A VOLUNTARY PETITION OF ONE PARTNER MADE AND FILED BY HIM IN THE PARTNERSHIP NAME REQUIRING NON-ASSENTING PARTNERS TO SHOW CAUSE WHY THEY SHOULD NOT BE ADJUDGED BANKRUPTS INDIVIDUALLY.

Two kinds of bankruptcy are provided for in the Act of 1898, Viz: Voluntary and Involuntary.

> "Any person except a municipal railroad, insurance, or a banking corporation, may become a voluntary bankrupt. Any natural person except a wage earner or a person engaged in farming or the tillage of the soil; any Unincorporated Company and any moneyed business or commercial Corporation except a Municipal railroad, insurance or banking corporation owing debts to the amount of $1000.00 or over may be adjudged an involuntary bankrupt. * * *"
>
> Bankruptcy Act of 1898 Section Four.

The first point we want to discuss here is the method of instituting involuntary as distinguished from voluntary proceedings.

Section three (b) provides that an involuntary petition may be filed against a person (the persons, firms and corporations mentioned in Section four above quoted) who is insolvent and has committed an act of bankruptcy with-

in four months after the commission of such act. Section three (a) defines what constitutes an act of bankruptcy.

Section 59 provides that involuntary petitions may be filed by three or more creditors who have provable claims aggregating at least $500.00 in excess of securities held by them; or if all of the creditors of the person to be proceeded against are less than twelve, then one creditor having a claim of $500.00 or over may institute the proceedings.

The voluntary petition may be instituted only by the bankrupt himself and we shall discuss this matter later on in this brief, where a partnership petition is filed. We want to limit this discussion to the question of the jurisdiction of the court to issue a subpœna upon a voluntary petition filed by one partner only, requiring remaining partners to show cause why they should not be adjudicated bankrupts individually.

Taking up the petition filed by Shugert in this case we find that he avers therein that (Record 56) it is the petition of John M. Shugert who respectfully shows that he and George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze who survived Lavinia Catherine Harris now deceased also a partner in her life time, are and have been partners under the style of Centre County Banking Company; that the principal place of business of the partnership is at Bellefonte, Centre County, Pennsylvania, that the partnership is insolvent and owes debts of $1000.00; That this petition was filed August 26, 1922, and the estate of said Lavinia Catherine Harris, deceased, is being administered by the Orphans' Court (The Probate Court of Pennsylvania) of Centre County; That Meek, Breeze and Mrs. Dale have not offered to join in said petition and that Shugert is not informed of their intention in said matter; that none of the partners are wage earners nor persons engaged in farming or tilling the soil, and that as individuals they owe debts which they are unable to pay in full; that there has been no final settlement of partnership business and that the debts of the partnership exceed $1000.00; that each of said partners is insolvent and they are jointly and

severally unable to pay the partnership debts; that attached to the petition is a schedule showing the debts of the partnership and an inventory of the partnership; that there are likewise attached schedules showing the debts of Shugert and an accurate inventory of his property.

Here then is a petition in bankruptcy filed by one man only, which contain all the jurisdictional averments required in an involuntary petition except.

(a) (There is no Act of Bankruptcy set forth).

(b) Shugert does not set forth that he is a creditor of the partnership nor that the creditors are less than twelve.

Where a voluntary petition is filed the only averment necessary is that the petitioner is one of the persons entitled to file a voluntary petition and that he is willing to surrender his property to the bankruptcy court for distribution. An averment of insolvency is not even necessary in a voluntary case, for a solvent person may surrender his property to the Bankruptcy Court for the purpose of distribution. Collier on Bankruptcy twelfth edition, Page 141 and cases there cited.

It is quite apparent therefore that the pleader who drew the petition filed by Shugert intended to file a combination voluntary and involuntary petition and we say that there is no authority in law for any such proceedings and the Bankruptcy Court is without jurisdiction to entertain such a petition and is certainly without jurisdiction to issue a subpœna to individuals under such a pleading requiring them to show cause why they should not be adjudged bankrupts individually. The subpœna complained of in this case should have been quashed and the petition as drawn should have been dismissed as to these petitioners.

II.

THE BANKRUPTCY ACT OF 1898 DOES NOT AUTHORIZE ONE PARTNER TO FILE A VOLUNTARY PETITION IN THE PARTNERSHIP NAME WITHOUT THE CONSENT OR ASSENT OF REMAINING PARTNERS BEFORE DISSOLUTION, OR AFTER DISSOLUTION BY OPERATION OF LAW.

The fundamental law relating to partnership in force throughout the United States and the rule in the federal Courts is that, unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to—

(A) Assign the partnership property in trust for creditors on the assignee's promise to pay the debts of the partnership.

(B) Dispose of the good will of the business.

(C) Do any act which would make it impossible to carry on the ordinary business of the partnership.

(D) Confess a judgment.

(E) Submit a partnership claim or liability to arbitration or reference.

The Supreme Court of Pennsylvania many years ago decided in Deckert vs. Filbert, 3 W. & S. 454, that one partner after the dissolution of partnership had no power to make a voluntary assignment of the effects of the partnership for the benefit of creditors without the consent of his co-partners.

The Supreme Court of the United States in Hall vs. Lanning 91 U. S. 160; 23 L. E. 271 decided that,

"After the dissolution of a co-partnership one of the

> partners in a suit brought against the firm has no authority to enter an appearance for the partners who do not reside in the State where the suit is brought and have not been served with process."

Justice Bradley who delivered the opinion of the Court uses this language therein.

> "In the case of Bell vs. Morrison, 1 Peters 351 this court decided upon elaborate examination that after a dissolution of the partnership one partner cannot by his admissions or promises bind his former co-partners. Appearance to a suit is certainly quite as grave an act as the acknowledgement of a debt. It is well settled by numberless cases that even before dissolution one partner cannot confess judgment or submit to arbitration so as to bind his co-partners. It is equally well settled that after dissolution one partner cannot bind his co-partners by new contract or securities or impose upon them a fresh liability. Appearance to a suit does impose a fresh liability * * * * * * on principle therefore it is difficult to see how after dissolution one partner can claim implied authority to appear for his co-partners in a suit brought against the firm."

We say that it is certainly quite as grave an act upon the part of one partner to file a voluntary petition in bankruptcy in the partnership name without express statutory authority so to do, as it is to enter an appearance or submit a question to arbitration or to confess a judgment. In fact the filing of a voluntary petition in bankruptcy carries with it a confession of judgment because a decree of adjudication immediately follows and settles for all time by a judgment of the court that the partnership is insolvent. To use the language of Justice Bradley it is therefore upon principle difficult to see how after a dissolution of the partnership one partner can plunge the partnership into a voluntary proceeding in bankruptcy in the absence of express authority so to do.

In the matter of voluntary petitions by partnerships the Act of 1898 differs from the Act of 1867 and we contend there is no authority in the Act of 1898 for the proceedings

instituted in the District Court by Shugert.

The Bankruptcy Act of 1867 specifically authorized the filing of a voluntary petition by any one of the partners. The language in that Act being, Section 36.

> "Where two or more persons who are partners in trade shall be adjudged bankrupt either on the petition of such partners or any one of them or on the petition of any creditor of the partners, a warrant shall issue, etc."

Since Congress in the Act of 1867 expressly provided that a voluntary bankruptcy proceeding by the partnership might be instituted by any one of the partners and did not in the Act of 1898 incorporate any such provisions, under well known rules for the interpretation of statutes, the presumption is that Congress intentionally omitted this provision, and having omitted it no such power is conferred by the Act of 1898.

There is no reason to assume that Congress omitted the 36th Section of the Act of 1867 from the present Bankrupt Act of 1898 by mistake or oversight. There is obviously a change in the legislative policy; caused by the numerous decisions in the federal courts criticising the unfortunate results arising from the presence of Section 36 in the older Act. It was recognized that the practice under said Section opened an easy door to rapacious and designing persons to oppress and harass their partners; besides in too many instances it made bankruptcy practice intricate and cumbersome by reason of the collateral issues of law and fact thus introduceable.

The maxim borrowed from the Roman law, *expressio unius est exclusio alterius* is so universally accepted as "A well settled legal maxim" and "The well established principle or maxim of law," and "As that universal and familiar rule" and "A rule both of law and equity," and "The well known maxim of construction and a very sound one;" that it would be an affectation to quote any of the multiplicity of authorities whether Federal, State or of the English Courts.

We will limit ourselves to apply this maxim in discussing the inclusion of Clause 36 in the earlier statute and its exclusion or any provision analagous thereto from the present bankrupt act.

"No maxim of the law is of more general and uniform application and it is never more applicable than in the construction and interpretation of statutes;" "The maxim was never more applicable than when applied to the interpretation of a statute that *expressio unius est exclusio alterius.*"

Broom's Legal Maxims, 8th Edition, page 663.

We must bear in mind that the Act of 1898 was not a repeal, amendment or a supplement to the Act of 1867, for that Act had expired by its own limitations; however, much of its provisions were reincorporated in the present legislation, and the rejection of Section 36 emphasizes the reason for applying the maxim above quoted and indeed necessitates its application.

"Whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative, namely, that the thing shall not be done otherwise."

25 Corpus Juris note "17 (c) page 220.

State vs. Tucson Gas Company, 15 Arizona, 294.

New Haven vs. Whitney, 36 Conn., 374.

Township vs. Dubuque, 7 Iowa, 262.

Scott vs. Ford. 52 Or., 288.

While the Act of 1898 as just above stated has not repealed the earlier Act of Congress, it is in fact a recodification, and its failure to include either Section 36 of the Act of 1867 or any similar provision implies in the strongest manner a negative.

"Possibly the strongest implication of a negative is found where subsequent statutes revise the whole matter of former ones."

Endlich on the Interpretation of Statutes, page 270.

So, Mr. Justice Swayne in delivering the opinion of the Supreme Court of the United States upon the construction of a revenue statute ruled that "The maxim *expressio unius est exclusio alterius* applies with cogent effect. This view is conclusive unless it is overcome by something else found in this statute."

Arthur vs. Cumming, 91 U. S. 362.

As Congress in 1898 refused to enact that "Partners in trade shall be adjudged a bankrupt either on the petition of such partners or any one of them, a warrant shall issue," and the statute under which we are now living entirely omits any proceeding in bankruptcy by one partner against another, how can it be argued that our present legislation on bankruptcy provides for a procedure such as we have at bar, though formerly authorized by a statute now defunct, but expressly excluded from the Act of 1898? All the powers of the bankrupt court, all procedures to be followed therein, are of statutory origin and all its jurisdiction rests exclusively upon the satute of 1898 alone.

Hobbs vs. McLean, 117 U. S. 567.

The Supreme Court in the case of Hobbs vs. McLean 117 U. S. 567; 29 L. E. 940, said upon this question:

> "Where a provision is left out of a statute either by design or by mistake of the legislature, the Courts have no power to supply it. To do so would be to legislate and not to construe."

III.

WHERE IT APPEARS UPON THE FACE OF A BANKRUPTCY PETITION FILED IN THE NAME OF A PARTNERSHIP THAT THE PARTNERSHIP WAS DISSOLVED BY OPERATION OF LAW AND THE PROPERTY OF ONE PARTNER IS BEING ADMINISTERED IN THE PROBATE COURT, THE BANKRUPTCY COURT IS WITHOUT JURISDICTION TO ADMINISTER THE PARTNERSHIP PROPERTY.

Both the original petition and the amended petition filed in this case state that:—

> "Lavinia Catherine Harris (who in her life time was a partner in this business) died on or about the 10th day of January, A. D., 1921, and her estate will be administered by the Orphans' Court of Centre County upon the filing of the account by her executors."

And in the prayer of the petition it is stated that George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, are surviving partners of Lavinia Catherine Harris, deceased.

The Supreme Court of the United States long ago recognized the principle that the Probate Courts of the several States have full and exclusive control over the estates of deceased persons. In the case of Yonley vs. Lavender 88 U. S. 276; 22 L E. 536 the Supreme Court uses this language:

> "The several States of the Union necessarily have full control over the estates of deceased persons within their respective limits. In Arkansas (the same is true in Pennsylvania) the probate of wills and the grant of letters testamentary and of administration are matters entirely within the jurisdiction of the Probate Court. The legal effect of granting letters testamentary or of administration is to place the whole estate real and personal within the custody of the law and leave it there until the administration has been completed. In this way the assets are preserved that there may be a

> fair and equal division of them among the several creditors according to a scale of priority fixed by law * * * * * * * all demands against deceased persons which are not liens upon specific property before the death of the debtor can only be collected by being brought under the administration of the Probate Court."

The Court then further considers the question in connection with the jurisdiction of the Orphans' Court in the State of Mississippi and cited the case of Williams vs. Benedict, 8 Howard 107. "The jurisdiction of the Orphans' Court had attached to the assets; they were *in gremio legis* and could not be seized by process from another Court."

We contend that the same rule of law prevails in connection with the bankruptcy law and that where one of the partners dies, thereafter the estate of such partner cannot be adjudged a bankrupt, and it necessarily follows that there can be no bankruptcy adjudication against the partnership, one member of which is dead.

Collier on bankruptcy 12th Edition, Page 175.

Collier says that there is a conflict of authority upon the question, but he also recognizes the principle above quoted concerning the jurisdiction of the Probate Court and in discussing this case says:

> "The only difficulty had upon adjudication in such a case is the consequent interference with the administration of the Probate Court of the estate of the deceased partner. In the above absence of express statutory authority it would seem more consistent to leave the creditors to their remedy in the Probate Court. The apparent lack of jurisdiction in the bankruptcy court to adjudicate the bankruptcy of a partnership where one of the members is dead is unfortunate, but it leads to confusion rather than to denial of justice".

The Supreme Court of the United States has apparently not passed upon the question, but there are a number of well considered cases which hold in accordance with the text in Collier just quoted.

In the case of Fackleman 41 A. B. R. 14; 248 Fed. 565, the matter is passed upon by Judge Bledsoe, Southern District of California, and he uses this language:—

> "After his decease (the deceased partner) as to his estate no proceedings in bankruptcy can be had and the creditors labored under the necessity of submitting to the jurisdiction and judgment of the Probate Court."

The precise question under consideration here was passed upon by Judge Newman in the Northern District of Georgia, in the case of Evans, 20 A. B. R. 406; 161 Fed. 590, in which case he held.

> "Where a partnership is dissolved by the death of a partner it is not subject to bankruptcy and the voluntary petition in bankruptcy of the surviving partner affects only his individual estate."

This was also the decision of the courts under the bankruptcy act of 1867, the leading cause upon the subject being in re Temple, Fed. Case No. 13825 and reported in 23 Fed. cases at Page 835.

In this case Temple was a member of two partnership firms viz:—Temple & Workman and Temple & Ledyard. He averred that both firms were insolvent and attached his individual schedule and the schedules of both firms. Adjudication followed and Temple as an individual and both partnerships were adjudged bankrupts.

After the petition in bankruptcy was filed and the adjudication made, a creditor filed a bill in equity in the District Court of California in behalf of himself and other creditors, in which it is set forth that both firms were insolvent and that Temple and the firm of Temple & Workman with intent to defeat the operation of the bankrupt laws had made an assignment of all their individual and partnership assets.

Temple likewise made an assignment of the assets of Temple & Ledyard in trust for the satisfaction of creditors. It is further stated that assignees had taken possession of

the property under circumstances which charged them with notice of the fact of insolvency.

The prayer of the bill is that in view of the fact that no assignee in bankruptcy had been appointed that (the assignees) Freeman and Spence might be enjoined from making any disposition or transfer of the assets conveyed to them under the assignment and that they be decreed to hold the same in trust for the assignee in bankruptcy to be elected.

The defendants, Freeman and Spence, the assignees referred to, filed a general demurrer and the Court in passing upon the question said:—

> "It is clear that the action of the register (the bankruptcy officer who made the adjudication under the act of 1867) adjudicating the firm of Temple & Workman and Temple & Ledyard to be bankrupt was wholly unauthorized and void. No notice was given to Ledyard as expressly required by rule 18 of the Supreme Court and Workman was dead at the time the court would commence proceedings. * * * * * The act speaks of persons who are partners in trade and although partners are deemed to continue to be such, quoad creditors, notwithstanding a former dissolution *inter sese* where there are joint assets and joint creditors it has never been held that a partnership dissolved by the death of one of the partners can be treated as still subsisting so as to be subject to the provisions of the bankrupt laws. * * * * * The status of a deceased person cannot be passed upon by a bankruptcy court nor has he any property the title to which can vest in an assignee appointed in a proceeding by or against the surviving partners."

We therefore say to the Court that it appearing from the averments in both the original and amended petitions of John M. Shugert that the said petitioner, Meek, Breeze and Mrs. Dale are surviving partners of Mrs. Lavinia Catherine Harris and that the latter died in January 1921, and her estate is now being administered in the Orphans' Court of Centre County, it necessarily follows that the District Court below is without jurisdiction and the said petitions in bankruptcy should be dismissed.

IV.

SCOPE AND INTERPRETATION OF THE PROVISIONS OF GENERAL ORDER NO. VIII AS APPLIED TO THE CASE AT BAR.

The Circuit Court of Appeals affirmed the order of the District Court apparently upon the authority of Francis vs. McNeal 228, U. S. 695, 57 L. E. 1029 and General Order No. 8 promulgated by the Supreme Court as one of the General Orders regulating proceedings in bankruptcy. Judge Davis in his opinion proceeds to argue that the authority for the decision in Francis vs. McNeal is Section 5 of the bankruptcy act as supplemented by General Order No. 8. In other words Section 5 is invoked to support General Order No. 8 and General Order No. 8 is invoked to authorize the proceedings in this case, and then concludes that the provisions of Section 5 as supplemented by General Order No. 8 is in legal effect equal to the provisions of Section 36 of the Act of 1867 which reads as follows:

> "Where one or more persons who are partners in trade shall be adjudged bankrupts *either* on the petition of such partners *or any one of them* or on the petition of any creditor of any partners a warrant shall issue."

This interpretation of the Act of 1898 requires the court to go outside of the statute itself to find the equivalent of the words used in the Act of 1867, "either on the petition of such partners or any one of them."

We contend that this amounts to judicial legislation and is a forced construction which ought not to prevail. We will attempt to demonstrate that both the District Court and the Circuit Court of Appeals erred in their conclusion in this matter.

Section 5 of the Bankruptcy Act of 1898 provides:

(A) "A partnership during the continuance of the partnership business or after its dissolution and before the final settlement thereof may be adjudged bankrupt.

(C) The Court of Bankruptcy which has jurisdiction over one of the partners may have jurisdiction over all of the partners and of the administration of the partnership and individual property."

General Order No. VIII provides:—

"Any member of a partnership who refuses to join in the petition to have the partnership declared bankrupt shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition and to make proof if he can that the partnership is not insolvent or has not committed an act of bankruptcy and to make all defences which any debt or proceeded against is entitled to take by the provisions of the act".

General Order No. VIII is practically a repetition of General Order No. XVIII of the act of 1867, which act expressly provided that a subpœna in bankruptcy might issue either on the petition of the partners or *any one of them.* This provision having been omitted from the Act of 1898 we believe that the provisions of General Order No. VIII are broader than the act itself and in so far as its provisions are inconsistent with the Act itself it must abate.

We contend that Section 5 (c) quoted above relates to the venue and is territorial in its application. That is to say that if an involuntary petition in bankruptcy be filed by creditors against the partnership that the court in which the same is filed shall have jurisdiction over all the partners even though some of them live beyond the jurisdiction of the court in which the petition is filed. It certainly is not authority for the proposition that one partner, contrary to the fundamental law governing partnerships, may institute a proceeding that will destroy the partnership. One partner cannot make an assignment of the partnership assets; dispose of the good will of the business; do any act which would make it impossible to carry on the ordinary

business of the partnership, or confess a judgment against the partnership.

The learned court below establishes a basis for its reasoning by an implication that because the Act provides that "a partnership may be adjudged a bankrupt"—that it may be so adjudged by a process not authorized by the Act itself. To our mind this is a reversal of all the rules of statutory construction. There is clearly no intention of enlarging in the language of Section 5 of the Act of 1898 the jurisdictional power of the Federal Courts, or of creating a process other than that explicitly laid down in the act itself, and the learned Judge is driven to re-enforce his reason by calling in General Order No. VIII. It is true that there are some decisions in the lower courts sustaining the position as recited in the said opinion, but a number of rulings by other lower federal courts could be cited to the contrary. None of the questions here involved were before this court in Francis vs. McNeal, 228 U. S. 695, for in the said cited case the petitioner was a creditor in an involuntary proceeding and the resisting partner and respondent was held by this Court to have estopped himself by his own prior acts and agreements as appeared from the record; thus waiving all his status as a non-assenting partner.

Nor can it be fairly argued from the wording of Section 5 (c) that the provisions of the prior Act of 1867, omitted from the Act of 1898 shall be read into it, for that is merely a proper provision to enable one district court, which has already jurisdiction, under the statute, of the partnership and one or more of the partners, to take jurisdiction over all the remaining partners whether they happen to reside within that particular district or not.

V.

THE CIRCUIT COURT OF APPEALS DID NOT GIVE PROPER LEGAL EFFECT TO THE CONDITION RESULTING FROM THE DEATH OF LAVINIA CATHERINE HARRIS.

Still more unsatisfactory is the reasoning in the opinion on the effect of the death of Lavinia Catherine Harris. In fact, this phase of the question is really not discussed or fairly met in said opinion. There is no attempt to meet the objections of the authorities holding to the contrary and no light or suggestion given to regulate the practice.

Thus Judge Newman in the Northern District of Georgia in the case of Evans in Re 20, A. B. R. 406; 161 Fed. 590 held:

> "Where a partnership is dissolved by the death of a partner it is not subject to bankruptcy and the voluntary petition in bankruptcy of the surviving partner affects only his individual estate."

Judge Bledsoe in the case of Fackleman, 41, A. B. R. 14; 248 Fed. 565 held:

> "After his decease (the deceased partner) as to his estate no proceedings in bankruptcy can be had and the creditors labor under the necessity of submitting to the jurisdiction and judgment of the Probate Court."

It was also held under the act of 1867 in Re. Temple Fed. cases No. 13825; 23 Fed. cases 835:

> "The act (of 1867) speaks of persons who are partners in trade and although partners are deemed to continue to be such, quoad creditors, notwithstanding a former dissolution *inter sese* where there are joint assets and joint creditors, *it has never been* held *that a partnership dissolved* by *the death of one of the partners* can be treated as still subsisting so as to be subject to the provisions of the bankrupt laws * * * * * the status of a deceased person cannot be passed upon by a bankruptcy court nor has he any property the title to which he can vest in an assignee appointed in a proceeding by or against the surviving partner."

The petition in this case sets forth that Lavinia Catherine Harris a former partner is dead and that her estate is in process of settlement in the Probate Court in Centre County, Pennsylvania. Whether her estate is solvent or not can only be determined in the final settlement as adjudicated in the Probate Court. Creditors of the partnership who want to assert claims against this woman's estate in case of a deficiency of partnership proprty will have to assert their claims in the Probate Court *co nomine* and not by any representative of a body of creditors such as a trustee in bankruptcy would be. Collier in Bankruptcy recognizes this defect and points out the lack of authority in the Act of 1898 to adjudge bankrupt a partnership after the death of one of the partners—Pages 242-243 13th Edition, Volume 1, where this author says "the apparent lack of jurisdiction in the bankruptcy court to adjudicate the bankruptcy of a partnership where one of the members is dead is unfortunate but it leads to confusion rather than denial of justice."

We disagree with the conclusion of the Circuit Court of Appeals in the concluding paragraph of the opinion where this language is used. "After the individual assets of the estate of Lavinia Catherine Harris are administered in the Probate Court if there is a surplus to be applied to the partnership debts it will be turned over to the bankruptcy court."

We contend that creditors of the Centre County Banking Company must individually assert their claims against the estate of Lavinia Catherine Harris in the Probate Court or be forever barred from asserting any claim against her estate. So many of the creditors as do not do this can not participate in any distribution of her estate because that court has exclusive jurisdiction to hear and determine all claims against the estate and if there is any surplus upon final adjudication it goes to the heirs or legatees. A trustee in bankruptcy would have no standing to assert any claim against this estate for he is not a creditor of it. He can only collect debts due the partnership.

The right of a creditor to pursue the individual estate of Lavinia Catherine Harris to recoup any deficiency after the partnership assets are ascertained and distributed is a right purely personal to such creditor which he may exercise or not as he sees fit. The estate of Lavinia Catherine Harris or any part thereof is not an asset of the partnership. Yonley vs. Lavender 88 U. S. 276; 22 L. E. 536; Williams vs. Benedict 8 Howard 107, 12 L. E. 1007.

It would seem from the opinion of his honor Judge Davis, that it would be a very easy thing for the Orphans' Court of Centre County, after discharging the indebtedness against the estate, to relieve itself of all further responsibility by delivering the balance of the estate to a trustee in bankruptcy. But has the learned Judge analyzed his own proposition or is he conscious of the inherent difficulties?

The Probate or Orphans' Court cannot delegate its powers, nor can it so easily shirk its duties and avoid its solemn responsibilities. In it and it alone has the sovereign State of Pennsylvania placed the care and custody of the estates of her dead, and that trust is not ended until the estate is distributed to and among those that are entitled to participate in its distribution. And to the Orphans' Court is alone given both the duty and the power of determining the distributees and fixing the amount of their respective distributions.

Among the many practical reasons not considered by the learned Judge is the primary one that the creditors of the banking partnership may not be, and in the case at bar are not, the same as the creditors of Lavinia Catherine Harris. The record reveals the fact that she died almost a year and a half before these proceedings were instituted. The banking business was continued for at least a year and four months after her death, and day by day new depositors were added thereto and the balances due depositors or creditors were necessarily changing daily. The status of the partnership creditors must be fixed as of the time of the filing of Shugert's petition. The status of the creditors of Lavinia Catherine Harris must be fixed in another jurisdic-

tion as of the time of her death. It thus appears that the future trustee for the Centre County Banking Company will represent much indebtedness and many creditors that were not in existence as such at the time of the death of Lavinia Catherine Harris and to which her estate is not liable. It therefore necessarily follows that the Trustee or Referee or even the Federal Court in Bankruptcy cannot receive nor is entitled in law to receive the remainder of the Lavinia Catherine Harris estate in bulk; nor can any of these usurp the jurisdiction of the Orphans' Court in unraveling this tangled skein.

We might re-enforce our argument by other illustrations of the inherent difficulty in the way of Judge Davis' short cut, but we believe that we have already said enough to convince this Court that the present bankruptcy legislation is no authority for the anomalous procedure presented by the record before it, and that the District Court in Bankruptcy is without jurisdiction to proceed.

VI.

MISJOINDER OF PROCEDURE.

There is certainly in the case at bar a fatal misjoinder of the causes of action. After making every allowance, the practice in the bankruptcy courts should have some method, and bear some analogy to the general rules governing pleadings in other courts.

Neither the Act of Congress nor any authoritative judicial decision authorizes any such drag-net process as we now have under discussion. From no viewpoint can we see any benefit to be derived from a single petition and a procedure arising thereunder, asking for the bankruptcy of different individuals with different estates and different sets of creditors and having nothing in common except that

for some purposes they may be partners. The case at bar is a striking illustration of the undesirability of such a lumping practice.

The petition of John M. Shugert avers that he is insolvent and asks for an adjudication of bankruptcy. So far it is a voluntary petition, clearly authorized by legislation. The record shows no one is opposing it, and yet no action is taken in the matter of his estate, no trustee is appointed, no protection given to his individual creditors, because of questions being raised by his asking in the same petition for an adjudication of bankruptcy against a partnership, of which he is a member. Now, there is no necessary relation between the two estates. Shugert could be personally insolvent while the partnership may not have any indebtedness, or if it has indebtedness the solvent partners might be able to take care of it. Why then should he have not presented at least two petitions, one as to himself, and an entirely separate petition relating to the partnership.

It must be borne in mind that the creditors are different, growing out of different relationships and having a different *status*. There could not be any common meeting for the election of a trustee, because the creditors of the partnership would have no voice in the election of a trustee for John M. Shugert's estate, nor would his individual creditors have any voice in the election of a trustee for the partnership estate.

Bad as this situation was as created originally, it was made much worse by the amendment to the petition asking for a decree of bankruptcy against four living alleged partners. Not a single creditor of any one of these four individuals has joined in this petition or gone upon the record. Not even have any of the partnership creditors joined in the petition. Where is the Referee to draw the line in conducting the proceedings involving so many different estates? The very attempt to combine six different procedures in one leads to confusion and delay instead of simplification. We, therefore, vigorously protest against the allowance of any such practice—the lumping of so many es-

tates with their several issues of fact and law in one common procedure,—and we strongly urge the necessity of vacating the entire procedure *ab initio*.

Respectfully submitted,

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